U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 02 December 2005

BALCA Case No.: 2004-INA-00089
ETA Case No.: P2002-TN-04394691

In the Matter of:

TENNESSEE GALVANIZING, INC.,
Employer,

on behalf of

ISMAEL MARTINEZ,
Alien.

Appearance: Peter C. Ensign, Esquire
Chattanooga, Tennessee
For the Employer

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer, Tennessee Galvanizing, Inc. filed an application for labor certification to enable the Alien, Ismael Martinez, to fill the position of Pickle Operator. The job duties for the position as described therein are as follows: "Operating crane to place metal in acid tank." (AF 73, Item 13). Furthermore, the stated job requirement was one year of experience in the job offered. (AF 73, Item 14).

In a Notice of Findings ("NOF") issued on January 6, 2003, the CO denied the Employer's request for Reduction in Recruitment ("RIR") processing because the job opportunity involves a Schedule B occupation. Furthermore, the CO directed the Employer to respond to various additional findings prior to returning the case to the State Workforce Agency. In summary, the CO found the following: 1) the Employer's $9.42/hour wage offer is below the prevailing wage rate of $11.49/hour; 2) the Employer failed to properly post the position; 3) the one year experience requirement is unduly restrictive because it exceeds the Specific Vocational Preparation level of "2" (*i.e.,* short demonstration up to and including one month); and, 4) the Employer did not comply with Section 656.21(b)(5) because the Alien's work history fails to demonstrate that he had the required experience when he was hired by the Employer. (AF 69-72).

In its rebuttal dated February 7, 2003 (AF 29-68), the Employer's counsel requested a Schedule B waiver pursuant to Section 656.23(d), noting that the company is located in a small town and the nearest metropolitan newspaper covers a large radius with thousands of readers. The Employer noted that "of the responses received, only one qualified, a gentleman who lives 45 minutes away and felt that it would be too far to commute." Furthermore, the Employer's counsel contended that this is not a typical Schedule B situation, which is often characterized by excessive turnover, since the Alien has been with the company for four years. (AF 30). In

addition, the Employer challenged the CO's finding regarding the prevailing wage rate issue. (AF 30-68). Finally, the Employer's counsel sought to address the other issues cited by the CO, as follows:

> As requested, the position will be re-advertised in the newspaper, deleting the one year experience requirement. Also, the employer will post the advertisement and a notice for the position for at least ten consecutive days in a conspicuous place on the job site. Furthermore, as required by 20 CFR 656.23(d), the employer will provide the closest unemployment office (Chattanooga) with a copy of the job posting.

(AF 30).

By correspondence dated February 28, 2003, the CO remanded the case to the State Agency, and requested that a prevailing wage specialist review the survey provided by the Employer. (AF 28). On the same date, the CO advised the Employer that its request for a Schedule B waiver and its alternative prevailing wage survey were under consideration. Therefore, the Employer was directed "**not** to proceed with any advertisement or recruitment until being advised by either the Regional office of [sic] the State Workforce Agency to do so." (AF 27).

On March 28, 2003, the CO advised the Employer that the State Workforce Agency had determined that "based on the changes the employer has made to the ETA 750, part A, this position is now a level I, the prevailing wage rate is now $8.97 per hour and the employer's offered salary is above the prevailing wage rate." However, the CO reiterated that the RIR request had been denied, and that the case was being returned to the State for a full test of the labor market. (AF 22-23). Accordingly, on or about March 28, 2003, the CO returned the case to the State Workforce Agency. (AF 20-21).

On September 24, 2003, the State Workforce Agency advised the Employer's counsel that resumes of four applicants had been forwarded to him, and that various recruitment

documentation (*i.e.,* posting, original resumes, the Employer's Statement of Recruitment Results form) must be received within 45 days from the date of the letter. Moreover, the State Workforce Agency letter stated in pertinent part:

> If this documentation is not received by **November 8, 2003,** this case will be closed and the Application for Alien Employment Certification and any supporting documents will be returned to you. Should you then resubmit the application, it will be treated as a new case and a new priority date will be assigned. There is no provision for an extension of the 45-day rule.

(AF 16).

On December 4, 2003, the State Workforce Agency closed the case "due to failure to respond to 45-day letter." (AF 19). Accordingly, on December 12, 2003, the CO issued a Final Determination denying certification on that basis. (AF 18).

On or about January 16, 2004, the Employer filed a Request for Review, together with various supporting documents. (AF 1-17). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals ("Board"). The Board issued a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief" on March 18, 2004. The Employer's counsel subsequently submitted a Statement of Position dated March 31, 2004.

DISCUSSION

Title 20, Section 656.21(h) of the Code of Federal Regulations states:

> The employer shall supply the local office with required documentation or requested information in a timely manner. If documentation or requested information is not received within 45 calendar days of the date of the request the local office shall return the *Application for Alien Employment Certification* form,

and any supporting documents submitted by the employer and/or the alien, to the employer to be filed as a new application.

On appeal, the Employer's counsel contends that the Employer had actively pursued this case. (AF 1-17). Furthermore, the Employer's counsel states that the failure to respond within the 45-day deadline of the September 24, 2003 letter was due to his own oversight, and that the Employer had actually complied with the request. (*See,* Statement of Position, paragraphs 7 and 8). Thus, the Employer's counsel asserts that the language of Section 656.21(h) should not be used to deny the substantive rights of the Employer and the Alien.

Based upon the plain language of Section 656.21(h), as well as the September 24, 2003 letter from the State Workforce Agency (AF 16), it is clear that a technical application of the 45-day rule warrants the cancellation of the current application and that the belatedly submitted documents should be considered in conjunction with a new application. However, this Board does not favor denial of labor certification on purely technical grounds. *See J. Michael & Patricia Solar,* 1988-INA-56 (Apr. 6, 1989)(*en banc*). Moreover, despite the importance of compliance with procedural deadlines, we have held it is not the purpose of the Act or the regulations to require a mechanical adherence to filing requirements when the ends of justice will not be served. *See, Madeline S. Bloom*, 1988-INA-152 (Oct. 13, 1989). Nevertheless, we have *on rare occasions* tolled the regulatory deadline, if the "ends of justice" will not be served by adhering to the strict 45 day filing requirement of §656.21(h). *See, e.g., Plastic Design, Inc.,* 1999-INA-170 (June 10, 1999).

On the other hand, we have held that the holding in *Bloom, supra,* must be construed strictly in order to assure clarity and consistency. *See Park Woodworking, Inc.*, 1990-INA-93 (Jan. 29, 1992)(en banc); *see also, Caci, Inc. – Fed.,* 1994-INA-15 (June 27, 1994*)*; *Condor Driving School,* 1991-INA-64 (May 5, 1992); *Miles Bros. & Co.,* 1991-INA-48 (May 1, 1992); *Michael Sussman*, 1993-INA-200 (Aug. 17, 1993); *Tutu Park, LTD,* 1993-INA-202 (Feb. 8, 1994).

In the present case, we find that "the ends of justice" would not be served by tolling the 45-day regulatory deadline. Although the Employer's counsel sought to accept responsibility for the Employer's failure to submit a timely response to the September 24, 2003 letter (*See,* Statement of Position, paragraphs 7 and 8; AF 16), we note that the supporting documentation consists of an *undated* letter from the Employer to its counsel. (AF 17). Even assuming that the Employer's counsel received the letter and had sufficient time to file it with the State Workforce Agency within the 45-day period, the Employer's letter is not fully responsive to the September 24, 2003 letter, in which the State Workforce Agency requested documentation of the posting, original resumes, and the Employer's Statement of Recruitment Results form. (AF 16). Moreover, even if the Employer had filed all the documentation requested, we find that there is no reasonable basis to assume that the application for certification would be granted on its merits. To the contrary, the Employer's undated letter, which involves three applications for labor certification, including the one filed on behalf of the Alien, Ismael Martinez, states in pertinent part:

> After reading through the resumes enclosed I have concluded that none of the applicants qualify for the position of pickle or kettle operator. The advertisements for the positions read that no experience was necessary. These two jobs are impossible to do with only verbal instructions. To even consider hiring anyone to immediately start into one of these position, they must have had at least a couple of years of hot-dip galvanizing experience where they worked in one of these two areas.
>
> The jobs of pickle man and kettle man are two of the most important in the galvanizing industry. They are highly specialized positions that require years of training.

(AF 17).

As set forth above, the Employer initially required one year of experience in the job offered. (AF 73). However, the CO challenged this requirement in the NOF because it exceeded

the SVP for the position and the Alien lacked such experience when he was hired. (AF 71-72). Rather than document that the one year experience requirement arises out of business necessity and/or that it is not feasible to hire someone without such experience, the Employer chose to delete the requirement. (AF 30, 116). The September letter then goes on to describe how the position requires "at least a couple of years of hot-dipping…experience." Accordingly, it is clear that the Employer rejected qualified U.S. applicants based on an unstated requirement. *See* 20 C.F.R. § 656.21(b)(5).

Since Employer did not comply with the 45-day provision of Section 656.21(h), and this is *not* an extraordinary case wherein the "ends of justice" require a tolling of the regulatory deadline, we affirm the Final Determination of the CO, and the underlying action by the State Workforce Agency.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400

Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.